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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. ~~208~~. 124

JOHN COULAM, GEORGE COULAM, HENRY COULAM, FANNY BAKER, SARAH J. HEINER, AND ZERA SNOW, APPELLANTS,

vs.

ANN DOULL

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED OCTOBER 5, 1886.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 398.

JOHN COULAM, GEORGE COULAM, HENRY COULAM, FANNY BAKER, SARAH J. HEINER, AND ZERA SNOW, APPELLANTS,

vs.

ANN DOULL.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF UTAH.

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a In the Supreme Court of Utah Territory.

JOHN COULAM *et al.*, Appellants, *vs.* ANN DOULL, Respondent.

Transcript.

Hall & Marshall, attorneys of appellant-; Sheeks & Rawlins Dickson & Varian, attorneys of respondent.
Filed January 9th, 1886.

E. T. SPRAGUE,
Clerk Supreme Court.

1 In the Supreme Court of Utah Territory.

In the District Court of the Third Judicial District of Utah Territory, Salt Lake County, *ss:*

JOHN COULAM, GEORGE COULAM, HENRY COULAM, Fanny Baker, Sarah J. Heiner, and Zera Snow, Plaintiffs,
vs.
ANN DOULL, Defendant. } Complaint.

Said plaintiffs, by leave of court and on consent of defendant, file this their amended complaint and allege that one John Coulam, on the 20th day of May, A. D. 1877, at Salt Lake City, in the county of Salt Lake and Territory of Utah, died; that at the time of and before his said death he was seized in fee simple, in possession of, and entitled to the possession of the following-described real property, to wit: All of lot No. six (6), in block fifty-nine (59), in plot "B," Salt Lake City survey, in the city and county of Salt Lake and Territory aforesaid, with the tenements and appurtenances thereunto belonging; that said premises are of the value of five thousand dollars; that said plaintiffs, John Coulam, George Coulam,
2 Henry Coulam, Fanny Baker, and Sarah J. Heiner, are the and the only children lineal issue of said John Coulam, deceased, him surviving, and are the heirs-at-law of three-fourths of the estate, real and personal, of said deceased; that plaintiff, Zera Snow, is the owner by mesne conveyances by and from said heirs-at-law, made since the death of said decedent, of an undivided one-fourth ($\frac{1}{4}$) part of the real estate above described, and that all said plaintiffs, by reason of the premises, have become and are seized in fee simple and entitled to the possession of the undivided three-fourths ($\frac{3}{4}$) of said above-described real estate.

Plaintiffs further allege that the defendant, Ann Doull, was the widow of said decedent; that since his death she intermarried with and now is the wife of one George Doull; that said decedent left a last will and testament, which has since been duly admitted to probate and of which the following is a copy, to wit:

"*The Last Will and Testament of John Coulam, Sen., of Salt Lake City, County of Salt Lake and Territory of Utah.*

I, John Coulam, being of sound mind and memory, do make and publish this my last will and testament in manner and form following: I give and bequeath unto my beloved wife, Ann Coulam, all my personal property and real estate, to wit, the sum of one thousand and twenty-five ($1,0025) dollars, held in trust by Wells, Fargo & Co. and now due me from the Hon. William A. Hamill by note now in my possession; and I also give and bequeath unto my said beloved wife Ann my freehold estate known and recorded as lot six (6), block fifty-nine (59), plot "B," Salt Lake City survey,
3 with all the messuages, tenements, and appurtenances thereunto belonging; and all the rest, residue, and remainder, and all the debts accruing to me of my personal estate, goods, and chattels of what kind and nature soever I give and bequeath the same to my said beloved wife, and I hereby revoke all former wills by me made.

In witness whereof I have hereunto set my hand this sixteenth day of May, in the year of our Lord one thousand eight hundred and seventy-seven.

JOHN COULAM, SR.,
Salt Lake City.

The foregoing instrument was here subscribed by John Coulam, Sr., the testator, in the presence of each of us, and was at the same time declared by him to be his last will and testament, and we, at his request, sign our names hereto as attesting witnesses.

FRANCIS DENTON BENEDICT, M. D.,
Residing in Salt Lake City, Utah.
ROBERT CAMPBELL,
Residing in Salt Lake City, Utah."

That in or by said will said John Coulam, testator, omitted to provide for any of his said children, the said plaintiffs; that it does not appear that said omission was intentional; that no indebtedness of decedent has in any way become a charge upon said real estate; that defendant is, and ever since the 15th day of April, A. D. 1880, has been, in the possession of said above-described real estate, and has had the rents and profits thereof; that said rents and profits are, and since April 15th, 1880, have been, of the value of three hundred dollars per annum, of which, since the date last aforesaid, plaintiffs are entitled to three-fourths; that plaintiffs, before the beginning of this suit, demanded of defendant to be let into possession, jointly
4 and in common with her, of the real estate above described; that defendant refused and still refuses to admit plaintiffs or any of them to said or any possession of said real estate.

Wherefore plaintiffs demand judgment against said defendant for the possession of three-fourths (¾), undivided, of said above-described premises, for rents and profits, at the rate of three hundred dollars

per annum, from April 15th, 1880, to entry of judgment, and for costs of suit.

E. T. SPRAGUE,
Attorney for Plaintiff.

Filed November 2, 1885.

Title: Answer.

Said defendant answers the amended complaint of plaintiffs and denies that the omission of said decedent testator to provide in his said will for his said children was not intentional on the part of said testator, and, on the contrary, alleges that said omission was intentional on the part of said testator and so appears.

Further answering, defendant, on information and belief, alleges that said testator during his lifetime bestowed on each of his said children, by way of advancement, an equal portion of his estate.

SHEEKS & RAWLINS,
DICKSON & VARIAN,
Attorneys for Defendant.

Endorsed: Filed November 2, 1885. J. M. Zane, clerk, by H. G. McMillan, deputy clerk.

5 *Title: Findings.*

This cause came on regularly to be heard on the 5th day of November, A. D. 1885, before the court sitting without a jury, a jury having been expressly waived in open court. The plaintiffs appeared by their counsel, E. T. Sprague, Esq., and Hall & Marshall, and the defendant appeared by Sheeks & Rawlins and Dickson & Varian.

Whereupon evidence was introduced and witnesses sworn and examined, when, after argument, the court being fully advised in the law and the premises, on the 18th day of November, A. D. 1885, renders its decision in writing and makes and files the following findings of fact:

That the omission and failure of John Coulam, Senior, the testator, to provide for any of his children, the said plaintiffs, in his last will and testament was intentional on his part.

As conclusions of law, the court finds that the defendant is entitled to recover herein.

Let judgment be entered accordingly, and for costs.

C. S. ZANE, *Judge.*

Dated November 20, 1885.

Endorsed: Filed November 20, 1885. J. M. Zane, clerk, by H. G. McMillan, deputy clerk.

6 *Title: Judgment.*

This cause coming on regularly for trial on the 5th day of November, 1885, one of the days of the regular September term, 1885, of said court, Messrs. E. T. Sprague and Hall & Marshall appearing

as attorneys for plaintiffs and Messrs. Sheeks & Rawlins and Dickson & Varian appearing as attorneys for defendant, and by express agreement of parties the trial of said case before a jury is waived, and, by consent, the case is tried before the court sitting without a jury; and the parties having introduced their testimony and evidence, and the case having been submitted to the court, and the court having now fully considered the evidence and proofs, finds the issues in favor of the defendant, and orders that judgment be accordingly entered.

Wherefore, by virtue of the law and by reason of the findings and conclusions aforesaid, it is by the court ordered, adjudged, and decreed that said plaintiffs take nothing by their said suit, and that their complaint herein be dismissed; and it is further ordered, adjudged, and decreed that said defendant, Ann Doull, have and recover from said plaintiffs her costs and disbursements on this behalf incurred and expended and taxed at the sum of $90.30.

Judgment entered November 20th, 1885.

[SEAL.] Attest: H. G. McMILLAN,
Deputy Clerk Third District Court.

Endorsed: Filed November 20, 1885. J. M. Zane, clerk, by H. G. McMillan, deputy clerk.

7 *Title: Statement.*

This action was tried on the 5th day of November and days following by the court, a jury having been expressly waived.

The defendant, to prove her case, called A. G. PADDOCK, who, being sworn, testified:

"I have lived in Salt Lake City over 14 years, and knew John Coulam, the husband of defendant, in his lifetime. I know lot 6, block 59, Salt Lake City, where said Coulam lived and defendant now lives. I resided, at the time of Mr. Coulam's death, in one of the two houses on that lot—the west one, a cottage of five rooms. I rented it of Mr. and Mrs. Coulam. I remember the decease of Mr. Coulam."

Question by defendant's counsel: "With reference to that fact, did you at any time within a few weeks before his death have any conversation with Mr. Coulam on these premises relative to his intentions concerning the disposal of his property?"

Objected to by plaintiff's counsel as incompetent and immaterial.

The objection was argued at length and sustained.

Counsel of defendant thereupon offered to prove—

First. That at the time of the execution and publication of the will the plaintiffs had all attained the age of majority and were all married.

Second. That long prior to the execution and publication of the will by the testator, on the 16th day of April, 1872, by way of providing for his said sons, George and Henry Coulam, gave to said

George and Henry, plaintiffs herein, certain lots of land, being
8 10 rods square, and prior thereto the testator had purchased certain real property and caused it to be conveyed to John Coulam.

This evidence is not offered for the purpose of showing advancements.

That prior to the execution and publication of the will the testator drafted and signed two instruments, whereby he purported to devise all of his property to this defendant, intending each of said instruments to be his last will and testament, but that the same were informal and not witnessed; that both before and after and at the time of the making and publication of the said will and a few weeks before his death the testator solemnly declared that he had made sufficient provision for his children, and that all of his remaining property was to be his wife's, meaning the defendant herein, and that his will so provided.

That at all times before and after and at the time of the execution and publication of his will and up to the time of his death the testator was in the full possession of his faculties and of sound and perfect memory; that the intention of the testator to omit to provide for his children by his said will was, at the time of the execution and publication thereof, well known to them and each of them and acquiesced in.

The testator had no other property at the time of the publication and execution of his will and at his death than that mentioned in the will.

That the defendant, by her own labor and exercise prior to the publication of the will, added to and enhanced the property mentioned in the will to the extent of the houses and improvements thereon; that plaintiff, John Coulam, is an illegitimate child.

9 The foregoing we offer in connection with the ruling already made.

In addition we offer now portions of this evidence, distinct from the rest, for the additional purpose of showing the circumstances surrounding the testator at the time of the publication of the will and at his death, and, in the light of those circumstances, that the will itself clearly shows the intention to omit to provide therein for his children, and in this behalf we offer to show distinctly from the other offer that at the time of the execution and publication of the will the plaintiffs had all attained majority and were married; that long prior to his death, on September 6, 1872, testator gave and conveyed to his sons, George and Henry Coulam, certain lots of land, each ten rods square, and prior thereto testator had purchased and caused to be conveyed to John Coulam certain real property. This last evidence is not offered for the purpose of showing advancements.

That at all times before and after, and at the time of the execution and publication of the will, and up to the time of his death, the testator was in full possession of his faculties and of sound and perfect memory; that the testator had no other property at the time

of the execution of his will and at the time of his death than that mentioned in the will.

Upon the foregoing offers the court ruled that such portion of the testimony as showed the situation and circumstances surrounding the testator at the time of making the will was admissible.

Defendants thereupon waived making any proof or any claim under their allegations of advancements contained in their answer.

10 Thereupon the defendant, to further prove her case, was sworn as a witness on her own behalf.

Plaintiffs, by their counsel, objected to any oral testimony whatever, on the ground that such or any evidence *dehors* the will is incompetent to show the intent of the testator and immaterial for any purpose, the issue upon advancements made having been waived by defendant.

This objection was overruled, and plaintiffs duly excepted.

Said defendant testified:

I was the wife of John Coulam, Sr., the testator, and lived with him as such the last 28 or 29 years of his life, and at his death, on the lot described in the will. There are 1¼ acres in this lot and two houses on it in one inclosure. The house we lived in was built soon after we went upon the lot, in 1849, and is two stories high. The other is a one-story cottage, and was built eleven or twelve years ago. I took boarders, and helped by my earnings to build both houses and bring up my husband's children. Mr. Coulam died the 20th of May, 1877. The will was made on the 16th of the same month. At that time John, the eldest son of my husband, lived on the lot adjoining that we lived on; was married, and had lived on that lot many years. His father had given him that lot about the time he married. He was past 30 years of age when he married. The other sons, Henry and George, lived, at the time my husband died, on the next block to ours, on a lot which their father had divided between them when they married, some 12 to 15 years before. The elder daughter, Fanny Baker, at the time of her father's death, lived at Pleasant Grove, in

11 Utah county; had then been married some years; is now 47 years old and has a family. The other daughter, Sarah Heiner, at the time of the death of her father, lived at Morgan City, in Morgan county; had been married several years and had a family of children. The husbands and both daughters were and are farmers and well to do. Husbands and the daughters visited the testator sometimes. All three of the sons visited their father daily during his last sickness, and John nearly every night, and all three helped to nurse him much of the time. Both the daughters visited testator once, about three weeks before his death, remaining three or four days. The testator sent for them. They were about his bed and assisted in taking care of him. They had been in the habit of visiting their father at intervals of a few months or a year. The last illness of testator continued four or five weeks; was a disease of the kidneys and very painful at intervals. He had also

a paralytic stroke about three weeks before his death. He was sensible to the last and retained his mental faculties till he died. A more sensible man never lived. He appeared to have a full recollection of the circumstances and of his surroundings and relatives up to the very last. I was present when the will was made. My husband told me to go to his little room, where his desk was, and get his papers out, which I did. I took them to Mr. Campbell and Dr. Benedict. Two old drafts of wills were among them, and these were laid either on the bed or on the table. Dr. Benedict had brought Mr. Campbell at the request of my husband. No one of the children was there present. All three sons were on the lot and had been in the house. It was in the morning. My husband sent for Mr. Campbell to copy the will. All the sons were in
12 the house again that afternoon and every day till their father died, and were present at his death. They came to see their father, how he was getting along. I think John sat up with him the night after the will was made. John knew of the will before his father's death, and I think the other sons did also. I did not contribute to building either house separately from my husband. What we, my husband, myself, and the children before their marriage, earned went into a common purse or stock, out of which the houses were built and the lots given the boys were paid for. The oldest son was over 30 years of age when married, and the second about 24. We were all poor when we went on the lot, and all worked hard in making the property. My husband at his death had no other property than that described in the will. I helped my husband in building houses for the sons with money I earned by keeping boarders. When I married Mr. Coulam the youngest son was a baby. All the children were issue of a former wife of testator.

Mrs. C. PADDOCK, called and sworn for defendant, testified:

I lived in the smaller or cottage house of John Coulam, Sr., for about a year, beginning February 10, 1877, as tenant, and knew Mr. Coulam, his wife, and three sons. The sons were at their father's house every day of his last sickness, and were present when he died. John was at my house after his father's death, on three occasions, to collect rent, as agent for his mother, the defendant. He told me on one occasion, about three months after the decease of his
13 father, that the house I occupied was his mother's; that she had worked hard for the money which went into it, and it was hers by right; that she earned all the money to pay for the place.

ROBERT L. CAMPBELL, called and sworn for defendant, testified:

I knew John Coulam, Sr., intimately in his lifetime for many years and was his friend. I drafted his will and subscribed it as a witness. I wrote the will at the house of the testator and in the room in which he was. Dr. Benedict, Mr. and Mrs. Coulam were present beside myself, and no others. Dr. Benedict had notified me the day before that I was wanted to make the will. I received in-

structions as to the will from both Mr. and Mrs. Coulam. I thought the mind of Mr. Coulam sound. He had before been partially paralyzed, but when he made his will his memory was good and mind as clear as ever, as to business. I visited him frequently during his last illness and conversed with him. During all this time his mind seemed clear and his memory good. Two other drafts of wills, not witnessed or published, though signed, were present when the existing will was made, and were substantially the same as the existing one. I don't know that these drafts were read to the testator at that time. They were handed to him. I showed them to him myself.

Defendant rested.

Counsel of plaintiff moved that all said testimony be stricken out, on the ground that the same was incompetent and immate-
14 rial in the case. This motion was overruled and denied, and plaintiffs duly excepted.

Thereupon counsel for plaintiffs moved to strike out all said testimony relating to the contents of the two drafts of wills mentioned by last witness, on the ground that it was incompetent and immaterial and at most only evidence of the testator's declarations. This motion was overruled, and plaintiffs duly excepted thereto.

JOHN COULAM was thereupon called by plaintiffs, sworn, and he testified:

I visited my father daily during his last sickness. He had kidney disease and suffered excruciating pain at intervals entirely through it; had a stroke of paralysis three weeks before his death. He was not deranged, except at the time of the stroke. He always recognized me, except for two or three days, at that time. He also recognized the other boys. He became very weak in body and mind as he neared his end. I was 33 years old when I married, which was in 1859. Before that I worked with my father at my trade as a carpenter and he had my wages. The lot he gave me cost $200 only. At the time of father's death it was more valuable than the one in controversy. My father was generally a quiet man, and would yield his wishes rather than have difficulty. My lot was bought in 1860 and given me the same year. My earnings prior to that time exceeded by much the value of the lot. I knew of the making of the will the evening it was made, and that it was of the same nature as the previous wills.

15 HENRY COULAM, called and sworn for plaintiffs, testified:

I was between 25 and 26 years old when I married, which was in 1867. I then received from father a whole lot, one which had some years before cost him $100, and was then worth but little more. I was a carpenter and worked for father till I married, and he had my wages. These earnings, after my majority and before my marriage, exceeded the value of the property he gave me. When my younger brother, George, married, I, at my father's request, gave him one-half the lot father had given me, and we have retained it so

divided ever since. During his last sickness I saw father almost daily. He became very weak towards the last, mentally and physically. The Sunday before the will was made he seemed unconscious; was in bed, his eyes not closed. He was not sleeping. Mrs. Coulam asked him if he did not know who it was. He made no answer, but burst out crying and shed tears. He failed to recognize my brother-in-law, whom he well knew. I saw father the morning of the day the will was made. He seemed a little better than before, but could not set up without being propped. I saw Dr. Benedict and Mr. Campbell when they arrived to make the will. I tried to go into the house, but the door was locked.

The same witness, on cross-examination, answered questions by defendant's counsel as follows:

Q. What do you mean by saying he (testator) was unconscious?

16 A. I mean to say that he did not know what he meant.

Q. You still say he was unconscious?

A. Yes, sir.

Q. You could see that he heard what Mrs. Coulam said to him?

A. No; he didn't.

Q. Don't you know that he heard what was said?

A. He might have heard.

Q. Then if he heard he was not unconscious, was he?

A. Not necessarily.

Q. How long did you remain there?

A. Not many minutes.

Q. Did you go again that or the next day?

A. I don't remember.

Q. Didn't you go every day?

A. Yes, sir.

Q. Did you talk with him every day?

A. Every day that he could talk.

Q. Was there any other days that he could not talk to you?

A. There was other days that he could not.

Q. When was it that he didn't talk to you beside that time?

A. Some two or three weeks before that.

Q. What was the occasion of that?

A. Paralytic stroke.

Q. With these two exceptions, what other days that you went there that he didn't talk?

A. Well, the Saturday morning—that day before he died.

Q. When did he die—on Saturday?

17 A. No; Sunday.

Q. Any other time that he didn't talk to you?

A. No, sir.

Q. Those three times?

A. Yes, sir. Every other time he talked with me.

Q. You talked about affairs every day?

A. Not much about affairs; just asked him how he was.

Q. Did you talk about the family and friends who had been to see him or anything of that kind?

A. Might have said something of that kind.

Q. Wasn't it generally the habit to talk about this thing and the other?

A. Yes, sir.

Q. And he kept up a conversation of that kind?

A. Yes, sir; when he was strong.

Q. What did he call you, Henry?

A. Yes, sir.

Q. He never took you for anybody else?

A. No, sir.

Q. Whenever he conversed with you he knew you and called you by name?

A. Yes, sir.

Q. Were you there when your two sisters were about? Were they there together or one at a time?

A. I think they were there at different times.

Q. You think one came and went away before the other came?

A. I think so.

Q. It was Mrs. Heiner who came first?

A. No, sir.

Q. The other lady, Mrs. Baker?

A. Yes, sir.

18 Q. And I presume during the time they remained in the city they spent a great deal of their time at their father's house?

A. Yes, sir.

Q. Waiting on him—were about his bed?

A. Yes, sir.

Q. They came there for that purpose?

A. Yes, sir.

Q. Of course, the boys and sisters and Mrs. Coulam would be all there together?

A. Yes, sir.

Q. And a general conversation going on?

A. Yes, sir.

Q. Family affairs and matters of your different acquaintances were discussed, I suppose, from time to time?

A. Well, there was not much of a talk.

Q. But the others were talking in his presence?

A. Yes.

Q. They didn't sit down there and cry?

A. No, sir.

Q. You were talking about different matters?

A. Yes, sir.

Q. And, among other things, your family matters?

A. Yes, sir.

Q. Your children, Fanny's children, and Sarah's children?

A. Yes.

Q. Those matters were talked about, were they not?

A. Yes, sir.
Q. Among you all?
A. Yes, sir.
19 Q. And I suppose he participated in the conversations, from time to time, when he felt like it?
A. Yes, sir.

Redirect:

Q. Anything said by your father about the children of your sisters?
A. I don't remember.

Mrs. FANNY BAKER, called and sworn for plaintiffs, testified:

I visited father once in his last sickness and staid three or four days. It was before he had the stroke. I talked to him but very little. He was able to sit up some. My sister was there at the same time. She had some of her children with her and they annoyed father. She went home with me when I left. Father seemed to be stupid when I talked to him; answered only yes or no, and appeared not to realize his situation; never spoke except as spoken to. When he did speak he spoke to the purpose. My sister had been there about two weeks.

The defendant, Mrs. DOULL, recalled in rebuttal, testified:

On the Sunday before his death Mr. Coulam received much company; was exhausted, and when I laid a baby on the bedside by him for him to kiss he looked at the child, tears came to his eyes, and he cried, but he was not unconscious.

20 The foregoing is all the evidence given in the trial of said action, and at its close plaintiffs, by their counsel, moved that all said evidence be stricken out, on the ground that it is incompetent and insufficient to prove or tend to prove any issue in said action, and especially the intent of the testator in making his last will. This motion was denied and overruled by the court, and to this ruling and decision plaintiffs then and there duly excepted.

Assignments of Errors.

Plaintiffs specify the following particulars in which the evidence is insufficient to justify the findings and judgment, to wit:

1. All said evidence is parol and *dehors* or extrinsic from the will, and therefore incompetent to prove the intent of the testator in making the will.

2. None of the facts or circumstances in evidence, nor all of them together, prove or tend to prove that testator omitted to provide for his children in the will intentionally.

And plaintiffs will rely on errors of law occurring at the trial and excepted to by them as follows:

1. In not sustaining objection of plaintiffs to any and all parol testimony offered.

2. In not striking out all the parol evidence given, as moved for by plaintiffs.

3. In finding as a fact from said evidence that testator omitted to provide for his children in his will intentionally.

4. In refusing to strike out evidence of the contents of two drafts of wills not published or witnessed, on the ground they were but declarations of testator.

21 The original draft of the foregoing statement, on motion for new trial, was made and served on defendant's counsel November 24, 1885. Time for serving proposed amendments thereto was by the court extended to the 15th day of December, 1885, and proposed amendments were served and filed December 14th of same year. By agreement of parties the amendments have been incorporated in the original drafts, and it is hereby stipulated that the foregoing statement is the result, and is true, and may be allowed by the court and filed December 23, 1885.

SHEEKS & RAWLINS,
Defendant's Attorneys.
E. T. SPRAGUE,
J. A. MARSHALL,
Plaintiffs' Attorneys.

The foregoing statement on motion for new trial is hereby settled and allowed this 23d day of December, 1885, by the court.

C. S. ZANE, *Judge.*

Endorsed: Statement on motion for new trial. Filed December 23, 1885. J. M. Zane, clerk, by H. G. McMillan, deputy clerk.

Title: Order Denying New Trial.

A motion of plaintiffs in this action, that the findings and judgment therein be set aside and vacated and new trial granted, based on the statement settled and filed December 23, 1885, and made on the grounds that the evidence is insufficient to justify the
22 findings and judgment; that the findings and judgment are against law, and of errors of law occurring at the trial excepted to by plaintiffs, the grounds being more fully set forth in said statement, came on to be heard the 29th day of December, 1885, was argued by counsel of the respective parties and submitted, and the court being now sufficiently advised thereon, it is ordered that said motion be, and it is hereby, overruled and denied. To this ruling and decision plaintiffs except.

By the court: C. S. ZANE, *Judge.*

Dated December 30, 1885.

Title: Notice of Appeal.

Take notice that the plaintiffs in the above-entitled action hereby appeal to the supreme court of the said Territory of Utah from the judgment therein, rendered November 20th, 1885, and also from the

order, made December 30, 1885, refusing to vacate said judgment and grant a new trial.

E. T. SPRAGUE,
HALL & MARSHALL,
Plaintiffs' Attorneys.

To the clerk of said district court and to Sheeks & Rawlins and Dickson & Varian, attorneys for defendant.

Endorsed: Filed December 31, 1885. J. M. Zane, clerk, by H. G. McMillan, deputy clerk.

The within notice of appeal has been served on us this 31st day of December, 1885.

SHEEKS & RAWLINS,
Defendant's Attorneys.

23 *Title: Bond on Appeal.*

Whereas judgment in favor of the defendant and against the plaintiffs in the above-entitled action was given in this court on the 20th day of November, 1885, for ninety and $\frac{30}{100}$ dollars costs, and said plaintiffs have appealed from said judgment and from an order refusing a new trial in such action to the supreme court of said Territory of Utah: Now, in consideration of and to perfect said appeal, and also to stay execution on such judgment, we, Zerubbabel Snow and Adam Spiers, of the city and county of Salt Lake, in said Territory, do jointly and severally undertake and promise on the part of said plaintiffs that they, said plaintiffs, the appellants, will pay all damages and costs which may be awarded against them on the appeal or on a dismissal thereof, not exceeding three hundred dollars; and we do further jointly and severally undertake and promise and acknowledge ourselves bound in the further sum of one hundred and eighty and $\frac{60}{100}$ dollars, double the amount of said judgment, that if the said judgment or order appealed from or either or any part of either thereof be affirmed or the appeal dismissed the appellants will pay the amount of said judgment or the parts of said amount as to which the judgment or order is affirmed, if affirmed only in part, and all damages and costs which may be awarded against the appellants on the appeal, and that if appellants do not make such payment within thirty days after filing the remittitur from the said supreme court of Utah Territory in the court from which the appeal is taken judgment may be entered on motion of the respondent in her favor against us, the sureties, for such
24 amount, together with the interest that may be due thereon and the damages and costs which may be awarded against the appellants upon the appeal.

Witness our hands and seals this 2nd day of January, 1886.

ZERUBBABEL SNOW. [SEAL.]
ADAM SPIERS. [SEAL.]

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

We, Zerubbabel Snow and Adam Spiers, being each duly sworn, each for himself says: I executed the foregoing undertaking. I am a freeholder in said county of Salt Lake, in Utah Territory, and reside therein, and I am worth the sum of eight hundred dollars over and above all my debts and liabilities, exclusive of property exempt from execution.

ZERUBBABEL SNOW.
ADAM SPIERS.

Sworn to before me this 2nd day of January, 1886.
GEORGE D. PYPER,
Justice of the Peace, Fifth Precinct,
Salt Lake City and County, Utah Territory.

Endorsed: Coulam *vs.* Doull. Undertaking on appeal. Filed January 2, 1886. J. M. Zane, clerk, by H. G. McMillan, deputy clerk.

25 We hereby certify and agree that the foregoing transcript of the record in this case is full, complete, and correct; also that the original complaint in said case was filed April 9th, 1884, and original answer therein filed April 29th, 1884.

HALL & MARSHALL,
Plaintiffs' Attorneys.
SHEEKS & RAWLINS AND
DICKSON & VARIAN,
Defendant's Attorneys.

26 TUESDAY, *January 19th, A. D.* 1886.

A session of the supreme court of Utah Territory was held this day, beginning at 10 o'clock a. m., pursuant to adjournment.

Present: All the justices, the clerk, marshal, and members of the bar.

Court was duly opened.

* * * * * * *

JOHN COULAM *et al.*, Appellants,
vs.
ANN DOULL, Respondent. } From 3d Dist.

This cause, coming on regularly for hearing, was argued by Messrs. Hall and Marshall for appellants, Messrs. Rawlins & Varian for respondent, submitted, and taken under advisement.

SATURDAY, *February 6th, A. D.* 1886.

A session of the supreme court of Utah Territory was held this day, beginning at ten o'clock a. m., pursuant to adjournment.

Present and presiding: The Hon. C. S. Zane, chief justice; present, also, the Hon. J. S. Boreman, associate justice, and the Hon. O. W. Powers, associate justice; the clerk, marshal, and members of the bar.

27 Court was duly opened.

* * * * * * *

JOHN COULAM *et al.*, Appellants,
vs.
ANN DOULL, Respondent. } From 3d Dist.

This cause having been heretofore argued and submitted and the court being sufficiently advised thereupon, it is now here considered, ordered, and adjudged that the judgment of the district court therein be, and the same is hereby, affirmed; and, further, that respondent have and recover of and from appellants —— dollars costs.

SATURDAY, *February 13th, A. D.* 1886.

A session of the supreme court of Utah Territory was held this day, beginning at 2 o'clock p. m., pursuant to adjournment.

Present and presiding: The Hon. C. S. Zane, chief justice; present, also, the Hon. J. S. Boreman, associate justice, and the Hon. O. W. Powers, associate justice; the clerk, marshal, and members of the bar.

28 Court was duly opened.

* * * * * * *

JOHN COULAM *et al.*, Appellants,
vs.
ANN DOULL, Respondent. } From 3d Dist.

Appellants, by their counsel, J. A. Marshall, pray the allowance of an appeal from the judgment of this court in this cause to the Supreme Court of the United States, and ask that the amount of a supersedeas bond, to be given thereon, be now fixed. Counsel of respective parties having been briefly heard thereon, said application was taken under advisement; remittitur stayed till further order.

29 Regular June Term.

MONDAY, *June 7th, A. D.* 1886.

A session of the supreme court of Utah Territory was held this day, beginning at one o'clock p. m., pursuant to the proclamation of the Governor, and at the Federal court-house, in the city of Salt Lake, in said Territory.

Present and presiding: The Hon. Charles S. Zane, chief justice; present, also, the Hon. Jacob S. Boreman, associate justice, and the Hon. Orlando W. Powers, associate justice; E. T. Sprague, clerk; the marshal, and members of the bar.

Court was duly opened.

* * * * * * *

JOHN COULAM *et al.*, Appellants,
vs.
ANN DOULL, Respondent.
} From 3d Dist.

Upon application therefor, made February 13th, 1886, it is ordered that an appeal of this cause to the Supreme Court of the United States from the judgment heretofore entered herein be, and the same is hereby, allowed, and that the amount of penalty of a supersedeas bond to be given thereon be and is fixed at five hundred dollars.

30 TERRITORY OF UTAH:

Supreme Court.

JOHN COULAM *et al.*, Appellants, *vs.* ANN DOULL, Respondent.

Opinion of the Court.

POWERS, *J.*:

The appellants brought action in the court below to recover an undivided interest in real estate. Parties plaintiff and defendant claim from a common source of title, viz., one John Coulam, who died testate in 1877. His will reads as follows:

"I, John Coulam, being of sound mind and memory, do make and publish this my last will and testament in manner and form following: I give and bequeath unto my beloved wife, Ann Coulam, all my personal property and real estate, to wit, the sum of one thousand and twenty-five ($1,025) dollars, held in trust by Wells, Fargo & Co. and now due me from the Hon. William A. Hamill by note now in my possession; and I also give and bequeath unto my said beloved wife Ann my freehold estate, known and recorded as lot six (6), block fifty-nine (59), plot "B," Salt Lake City
31 survey, with all the messuages, tenements, and appurtenances thereunto belonging; and all the rest, residue, and remainder and all debts accruing to me of my personal estate, goods, and chattels of what kind and nature soever I give and bequeath the same to my said beloved wife; and I hereby revoke all former wills by me made."

The will was executed, witnessed, and published in conformity with the provisions of the statute. The plaintiffs are the children of the deceased, and, the will ignoring them, they base their claim to a portion of the property devised upon—

§ (694) of the Compiled Laws of Utah, which is as follows:

"When any testator shall omit to provide in his or her will for any of his or her children or for the issue of any deceased child, unless it shall appear that such omission was intentional, such child or the issue of such child shall have the same share in the estate of the testator as if he or she had died intestate, to be assigned as provided in the preceeding section."

32 This statute, found on page 272, Comp. Laws, is conceded to be applicable to the case at bar, and no contest is made over the amount of interest claimed by plaintiffs. The answer makes an issue on advancements under sec. (696) of Com. Laws of Utah, but this issue on the trial was waived by defendant (see p. 9 of transcript), and the only issue in the case as tried was whether the omission of the testator to provide for his children appeared to be intentional.

On the part of the appellants it is contended that the omission of the testator to provide in his will for his children by virtue of the statute annexes to the will the condition that the will shall be void, *quoad* the children, unless a contrary intention appears by intrinsic evidence, and that the operation of this rule of law is altogether independent of the intention of the testator, except as that intention may be expressed in the will.

On the part of respondent it is contended that the inten-
33 tion of the testator to omit to provide for his children can be shown by extrinsic as well as intrinsic evidence, and this position was adopted by the learned judge who presided at the trial of this case in the lower court, and in pursuance thereof extrinsic evidence tending to show the intent of the testator was admitted over the appellants' objection, and this ruling of the court furnishes the principal assignment of error in this case.

We do not think the court erred in admitting the evidence. Generally the admissibility of extrinsic evidence depends upon whether there is in respect to the written instrument a patent or a latent ambiguity, such evidence being admitted in the case of the latter, but not the former. Greenleaf on Ev., § 297. A patent ambiguity arises solely from the terms of the instrument, while a latent ambiguity is one not appearing upon the face of the instrument, but is developed by extrinsic evidence. 2d Wharton Ev., § 956.

In the latter case the difficulty introduced by extrinsic evi-
34 dence may be explained by further evidence on the same subject showing the real intent. Atkinson *vs.* Cummings, 9 How., 479; Tillotson *vs.* Rice, 22 N. Y., 122–126.

The will is, in this case, free from any patent ambiguity. Looking at the will alone, the intention is clear that the defendant should have the property. The doubt which alone the evidence was admitted to resolve was created by the fact, extrinsic the will introduced by appellants, that they were the children of the testator. This fact, established *dehors* the will, coupled with the omission of testator in his will to provide for his children, has the effect under the statute (Comp. Laws, sec. 694) to raise the presumption that the testator had made the omission through some inadvertence or mistake and not intentionally. It was to afford relief to a child in case of actual oversight or mistake, and not to defeat the real intention of the testator that the statute was enacted. Church
35 *vs.* Crocker, 3 Mass., 20; Wilson *vs.* Foskett, 6 Met., 400; Payne *vs.* Payne, 18 Cal., 291.

This presumption of mistake is made a disputable one by the express words of the statute, "unless it shall appear that such omission

was intentional," or, as in the statutes of Massachusetts and Iowa, "unless it shall appear that such omission was intentional and not occasioned by any accident or mistake." Comp. Laws, sec. 694.

The legislation in Massachusetts is really the source of all the statutes of the different States upon this subject. The earlier statute was adopted in Missouri and in some other States, and the later, including the qualifying clause above set forth, was adopted in Iowa, California, and Utah. In Missouri the statute was absolute and the presumption conclusive that the the child should inherit unless provided for in the will. However, it was held that the presumption did not arise if it could be seen from the will that
36 the child had not, in fact, been forgotten. Church *vs.* Crocker, 3 Mass., 20; Bradley *vs.* Bradley, 24 Mo., 311. If, under our statute, the matter to repel the presumption must appear upon the face of the will, then the clause, "unless it shall appear that such omission was intentional," is superfluous. We think that the statute opens the door for the admission of any competent evidence. The effect of extrinsic evidence in a case like the one at bar is not to change, alter, add to, or control any of the terms of the will. It simply shows that the will is what it purports to be, and that the omission of the children was intentional.

The cases cited by counsel for appellants upon this point are inapplicable, because in each the parol evidence was offered to change the plain meaning of the words used in the will, as that "money" meant "promissory notes" (1 John. Ch., 231); or that while describing one tract of land another was meant (53 Ill., 514),
37 or that by the "Seaman's Aid Society in the city of Boston," the testator intended "the Seamen's Friends Society" (7 Met., 188), both existing.

The Missouri cases are not authority under our statute.

The statute in that State was absolute. The court, in 24 Mo., 315, says: "Our statute is not like the Massachusetts statute, for this has the provision in it, unless it shall appear that such omission was intentional," etc. (6 Met., 404).

We are not able to reason ourselves clear from the effect of our statutes by anything said upon the subject by the Massachusetts courts; ours is a positive enactment—no proviso to it on account of mistake or intentional omission."

We think that our statute and the statute of Massachusetts, Iowa, and California are in substance, meaning, and purpose precisely the same. Massachusetts was the original source from which it was derived and adopted. Before its adoption in California or in
38 this Territory it had received an interpretation in Massachusetts and Iowa. Wilson *vs.* Foskett, 6 Metcalf, 400; Lorieux *vs.* Keller, 5 Iowa, 196–203.

It was said in Lorieux *vs.* Keller that "their (the children's) right, if any, must first accrue on the death of the testator. They do not claim under the will, but in opposition to it, and they are seeking to supercede it. The declarations of the testator at the time of executing the will, that he had already given to his daughter, Madeline Keller, her portion of his property, and that he intended

to make no further provision for her, were certainly proper to show the intention of the testator in the disposition of his property by his will. These declarations in no sense contradict, add to, or explain the contents of the will. They were not offered for any such purpose, but to show the circumstances under which the will was executed and the relations of the testator to the persons and
39 things around him. Parol evidence certainly cannot be given to change the provisions of the will from the construction which the letter of the testament and the law gives it. It cannot be varied, altered, or explained in such mode. While we agree in holding this to be the law, we must also hold that parol evidence is admissible when its introduction is required by evidence extrinsic of the will, when it tends to establish and sustain the will, or when it consists of declarations of the testator made at the time of its execution, contemporary with the act, and showing its legal quality. Such are parts of the *res gestæ*.

"It is not contended but what it was competent for the plaintiff, when his rights under the will are brought in question, in some manner to establish the fact that the omission by the testator to make provision in his will for his children was intentional and not the result of accident. How may he show it? Must it
40 appear from the will itself? The argument of the appellants would preclude its being shown in any other manner. We are of the opinion that it may be shown in any legitimate mode by extrinsic evidence, either written or parol, by the declarations of the testator at the time of executing the will, or by any act, circumstances, or admissions of the party which will go to show that the defendants have received their portion of their father's estate, or that he intended to pass them by in his will."

The reasoning of the court seems to us to be conclusive and its conclusions sound; but it is argued that we took the section of the statute under consideration from California, and that it has received a different construction in that State, and that our Legislature must be presumed to have adopted the statute with the construction put upon it by the courts of California. This rule is not absolute. Cathcart *vs.* Robinson, 5 Peters, 340. The statute, as we have seen,
41 was construed by Massachusetts and Iowa before it was adopted in California, and the California decision seems to us to be opposed to the weight of authority and of sound reason, and to be a departure from the prevailing interpretation. The case referred to is Matter of Estate of Garraud, 35th Cal., 342. It assumes that the object of admitting extrinsic evidence in cases of this kind is to alter the terms of the will. The contrary is the case, for the evidence simply confirms and gives effect to the will. It attempts to distinguish the California from the Massachusetts statute, saying, on page 342, "The case of Wilson *vs.* Foskett, 6 Met., 400, is cited as authority in point to support the views of respondent's counsel. The Massachusetts statute differs very materially from ours, and the concluding clause is as follows, to wit: 'Unless it shall appear that such omission was intentional and not occasioned by any mistake or accident.' The last part of the clause is not found in our act,

42 and, we think, is the key to the decision in Wilson *vs.* Foskett. It opens the door for proof on the question whether or not the omission resulted from mistake or accident."

We think that the words "unless it shall appear that such omission was intentional," found in the Utah statute, opens the door for proof just as wide as if there had been added the words "and not occasioned by accident or mistake." We prefer to follow what seems to be the better reason, supported as it is by the weight of authority, and to hold that the testimony objected to was admissable.

As supporting our conclusion, we call attention to the fact that the earlier English authorities and the authorities in this country hold that parol evidence is admissible to rebut the presumption of revocation of a will arising from a subsequent marriage and the birth of a child. Brady *vs.* Cubitt, Doug., 31; Brush *vs.* Wil-
43 kins, 4 Johns. Ch., 506. Chancellor Kent says, in his commentaries, that "it is generally agreed that the implied revocation by a subsequent marriage and — a child, being founded on the presumption of intention, may be rebutted."

II. The appellant also contends that the evidence admitted on the trial was insufficient to justify the finding that the testator intended to omit to provide for his children. It appears from the evidence that the mind of the testator was clear when he made the will. One of the witnesses swears that "he was as sensible as he ever was in his life." He had previously prepared the drafts of two other wills, which were before him when the will in question was drafted. These were in his own handwriting and signed by him, and he called for them when the will at bar was drafted. Both these drafts omitted to provide for his children. A Mr. Campbell drafted the will, and the testator gave instructions as to what it should contain. The tes-
44 tator's wife, the defendant in this action, had lived with him for nearly thirty years, had raised his children—the youngest from babyhood; had worked hard and helped to make the money with which the houses upon the lot were built. The testator must have known that which is a matter of common knowledge—that his widow would have no rights of dower in his property, that not being allowed in this Territory. The property mentioned in the will was all the testator had, and he knew that if his wife received it all it would furnish her with but meagre support during her old age.

The children had all attained maturity, were married, had homes of their own (chiefly bestowed on them by the testator and the defendant, his wife), and were in comfortable circumstances—perhaps better off than the widow of the testator would be if she got all his property. These and similar facts appearing in the record were all known to the testator when he made his will; that he did not
45 forget his children, but that they must have been in his mind and intentionally omitted from his will appears from the fact that they had been omitted from the two previous wills as well as this; that during this same illness, when he made the will, he sent for his daughters, residing at a distance, to come to him, which they did, remaining some time and attending upon and nursing him.

During his illness his boys were in daily attendance upon him, and he always recognized them. In the afternoon before the will was made the testator requested the doctor to bring Mr. Campbell to prepare it, who came the next morning. During that night his son John sat up with him, and the next morning, before the will was made but in contemplation, all the boys were in to see him, and Henry testifies that he then seemed better than usual. They were all in again that day after the will was made and every day
46–47 until his death. Under such circumstances it is impossible not to believe that the will giving all his property to his wife to the exclusion of his children was the deliberate and intentional act of the testator, done with a full comprehension of the situation. That it was a just act John recognized, as appears from the testimony of Mrs. Paddock.

We think that these facts show, taken in connection with the will itself, that the testator intentionally omitted to provide for his children. See Buckley *vs.* Gerrard, 123 Mass., 8; Peters *vs.* Siders, 126 Mass., 135; 6 Wall., 350.

We have been greatly aided in the consideration and determination of this important question by the very able arguments of counsel for both sides and the elaborate and exhaustive briefs presented.

Our conclusion is that there is no error in the record, and that the judgment of the court below must be affirmed.

Zane, C. J., concurs.

Boreman, J., concurs.

Endorsed: Filed February 6th, 1886. E. T. Sprague, clerk.

48 UNITED STATES OF AMERICA, *ss:*

To Ann Doull, Greeting:

You are hereby cited and admonished to be and appear at a Supreme court of the United States, to be holden at Washington on the second Monday of October next, pursuant to an appeal allowed in a certain cause lately pending in the supreme court of Utah Territory, wherein you are defendant and respondent and John Coulam, George Coulam, Henry Coulam, Fanny Baker, Sarah J. Heiner, and Zera Snow are plaintiffs and appellants, to show cause, if any there be, why the judgment from which said appeal is allowed should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 16th day of June, in the year of our Lord one thousand eight hundred and eighty-six.

[Seal Supreme Court Territory of Utah, United States of America.]

C. S. ZANE,
Chief Justice of Utah Territory.

Attest: E. T. SPRAGUE, *Clerk.*

49 [Endorsed:] Coulam *vs.* Doull. Citation. Filed June 16, 1886. E. T. Sprague, clerk.

TERRITORY OF UTAH,
County of Salt Lake, } ss:

John A. Marshall, being duly sworn, says: I served this citation on the counsel of respondent therein named by delivering to and leaving with B. Sheeks, one of said counsel, a true copy thereof, at Salt Lake city, in said county, on the 18th day of June, 1886.

——— ———.

Sworn to before me this — day of ———, 1866.

——— ———,
——— ———.

Received copy of within this June 18th, 1886.
SHEEK & RAWLINS AND
C. S. VARIAN,
Att'ys for Respondents.

50 Know all men by these presents that we, Zerubbabel Snow and Isaac M. Waddell, both of the city and county of Salt Lake, in Utah Territory, are held, firmly bound, and justly indebted to Ann Doull, of same place, in the sum of five hundred dollars, lawful money; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 16th day of June, A. D. 1886.

Whereas lately, at the January term of the supreme court for the Territory of Utah, in a cause depending in said court between John Coulam, George Coulam, Henry Coulam, Fanny Baker, Sarah J. Heiner, and Zera Snow, as plaintiffs and appellants, and said Ann Doull, defendant and respondent, judgment was rendered against said appellants affirming the judgment of the district court of the third judicial district of Utah Territory, and the said appellants having since obtained the allowance of an appeal from said judgment of affirmance to the Supreme Court of the United States, and a citation directed to the said Ann Doull citing and admonishing her to be and appear at said Supreme Court of the United States at a session thereof to be holden at Washington on the second
51 Monday of October, 1886:

Now, the condition of the above obligation is such that if the said appellants shall prosecute their said appeal to effect and answer all damages and costs in case they fail to make their appeal good, then this obligation to be void; otherwise to remain in full force and effect.

ZERUBBABEL SNOW. [SEAL.]
ISAAC M. WADDELL. [SEAL.]

In presence of—
E. T. SPRAGUE.

TERRITORY OF UTAH, } ss:
County of Salt Lake, }

Isaac M. Waddell and Zerubbabel Snow, being duly sworn, each for himself says: I am a freeholder in said Territory of Utah, and I am worth the sum of five hundred dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

ISAAC M. WADDELL.
Z. SNOW.

Subscribed and sworn to before me this 16th day of June, 1886.
[SEAL.] E. T. SPRAGUE,
Clerk of Supreme Court.

The foregoing bond is approved as to form and sufficiency.
June 16th, 1886.

C. S. ZANE,
Chief Justice of Supreme Court of Utah Territory.

Endorsed: Filed June 16th, 1886. E. T. Sprague, clerk.

52 Know all men by these presents that we, Zerubbabel Snow and Isaac M. Waddell, both of the city and county of Salt Lake, in Utah Territory, are held and firmly bound unto James H. McKenney, clerk of the Supreme Court of the United States, in the sum of two hundred dollars, to be paid to the said McKenney, his heirs, successors, or legal representatives; for which payment, well and truly to be made, we hereby bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 16th day of June, A. D. 1886.

Whereas at a term of the supreme court of Utah Territory, held on the 7th day of June, 1886, in a certain cause theretofore pending in said court, in which John Coulam, George Coulam, Henry Coulam, Fanny Baker, Sarah J. Heiner, and Zera Snow were plaintiffs and appellants and Ann Doull was defendant and respondent, an appeal was allowed to the Supreme Court of the United States from the judgment in said cause, which judgment was in favor of said respondent and against said appellants:

53 Now, if said plaintiffs and appellants shall well and truly pay or cause to be paid to the said McKenney and his successors in office all such fees and costs as shall accrue to him or them on the appeal so as aforesaid allowed and are chargeable to said ap-

pellants, then this obligation to be void; otherwise of full force and virtue.

ZERUBBABEL SNOW. [SEAL.]
ISAAC M. WADDELL. [SEAL.]

In presence of—
E. T. SPRAGUE.

Approved:
C. S. ZANE,
Chief Justice.

Endorsed: Filed June 16th, 1886. E. T. Sprague, clerk.

54 TERRITORY OF UTAH, } ss:
Salt Lake County, }

Zerubbabel Snow and Henry Coulam, each of Salt Lake City, in said county, being duly sworn, deposes and says: I know the land and premises described as lot six (6), in block fifty-nine (59), plot B, Salt Lake City survey, situate in said city and county of Salt Lake and Territory of Utah, and know the value thereof, and said value thereof exceeds five thousand dollars. I know Ann Doull, the defendant and respondent in a certain action lately pending in the supreme court of said Territory of Utah, in which John Coulam, George Coulam, Henry Coulam, Fanny Baker, Sarah J. Heiner, and Zera Snow were plaintiffs and appellants. The age of said Ann Doull on the 20th day of November, 1885, the date of entry of judgment in the district court in said action, exceeded sixty-five years, and the value of an undivided one-fourth (¼) part of the above-described premises, exclusive of a life estate therein of and for said Ann Doull, exceeds five hundred dollars; that the amount of rents received by said
55 Ann Doull of and for the lands and premises above described, accruing from and after April 15th, 1880, and before said 20th of November, 1885, exceeds, as deponent, from admissions of said Ann Doull and otherwise, is informed and believes, $1,675.00; and, further, that the matter in dispute in the action above described exceeds in value the sum of five thousand dollars.

ZERUBBABEL SNOW.
HENRY COULAM.

Subscribed & sworn to before me this 18th day of June, 1886.
[SEAL.] E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

Endorsed: Filed June 18th, 1886. E. T. Sprague, clerk.

56 TERRITORY OF UTAH, } ss:
County of Salt Lake, }

I, E. T. Sprague, clerk of supreme court of said Territory of Utah, in pursuance of an appeal allowed by said court in the action of John Coulam *et al*, plaintiffs and appellants, *vs.* Ann Doull, defendant and

respondent, a copy of the allowance of which appeal is hereto attached, do return, hereto attached, a transcript of the record and proceedings, the opinion, supersedeas bond and bond for costs, affidavit of value of matter in dispute, together with the original citation, all in and of said court in the cause above described, to the Supreme Court of the United States; and I hereby certify that said attached transcript of the record and proceedings, opinion, supersedeas bond and bond for costs, and affidavit of value is a true, full, and complete copy of the several originals thereof on file or of record in my office.

In witness whereof I hereunto set my hand and affix the seal of said supreme court of Utah Territory this 29 day of September, A. D. 1886.

[Seal Supreme Court Territory of Utah, United States of America.]

E. T. SPRAGUE,
Clerk of Supreme Court of Utah Territory.

Endorsed on cover: Utah Territory supreme court. No. 398. John Coulam, George Coulam, Henry Coulam, Fanny Baker, Sarah J. Heiner, & Zera Snow, appellants, *vs.* Ann Doull. Filed October 5, 1886.

Office Supreme Court U. S.
FILED,
SEP 8 1888
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1888.

NO. 398.

JOHN COULAM, GEORGE COULAM, HENRY COULAM, FANNY BAKER, SARAH J. HEINER AND ZERA SNOW, *Appellants*,

—*vs.*—

ANN DOULL.

BRIEF FOR APPELLANTS.

WILLIAM C. HALL,
JOHN A. MARSHALL,
Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1888.

NO. 398.

JOHN COULAM, GEORGE COULAM, HENRY COULAM, FANNY BAKER, SARAH J. HEINER AND ZERA SNOW, *Appellants*,

—*vs.*—

ANN DOULL.

BRIEF FOR APPELLANTS.

This action was brought to recover an undivided three-fourths interest of a city lot in Salt Lake City, Utah: and also an undivided three-fourths of the rents and profits of said lot since April 15th, 1880.

JURISDICTION.

When the appeal in this case was allowed it was contended in behalf of the appellee that the amount involved was not sufficient to give the Court jurisdiction, and the same question may be raised here.

The city lot in question is shown by the record to have been worth five thousand dollars when the complaint was filed and also when the judgment was rendered. (See transcript, pp. 2 and 24). An undivided three-fourths of the lot would then be worth three thousand, seven hundred and fifty dollars.

It is alleged in the complaint, and admitted by the answer, that the rents and profits of said lot since April 15th, 1880, amounted to three hundred dollars per annum, and that such amount was actually received by appellee as rents and profits therefrom. (See transcript, pp. 2 and 3.) The amount of the rents and profits so received up to November 20th, 1885, the date

of the judgment in the trial court, (see transcript, page 4), was therefore one thousand, six hundred and seventy-nine dollars and sixteen cents; three-fourths of which sum would amount to twelve hundred and fifty-nine dollars and thirty-seven cents, making the total amount in controversy at the date of the judgment in the trial court five thousand and nine dollars and thirty-seven cents.

The judgment in this action, unless reversed, is conclusive as against appellant's claim to the remainder, after appellee's life estate in the other undivided one-fourth of said lot. This remainder was, on November 20th, 1885, worth the sum of five hundred dollars, (see transcript, p. 24), and should be considered in determining the amount in controversy.

Troy vs. Evans, 97 U. S., 1.

But, without invoking the collateral effect of the judgment, the amount in controversy is shown by the record to have exceeded five thousand dollars at the date of the judgment in the trial court. (See transcript, pp. 2 and 24.)

The statement in this case was settled and used on a motion for a new trial, but it became the statement on an appeal from the final judgment by virtue of Sec. 839 of the Code of Civil Procedure of Utah, Laws of 1884, p. 307, which provides that "any "statement used on motion for a new trial * * * * may be "used on appeal from a final judgment equally as upon appeal "from the order granting or refusing the new trial."

II.

The appellants and the appellee claim under a common source of title, viz.: one John Coulam, who died testate in 1877. His will is set out in the complaint, (see transcript, p. 2), and purports to give his entire estate to his wife, the Appellee, entirely ignoring the appellants, his children.

(694) Sec. 10, Compiled Laws of Utah of 1876, p. 272, is as follows: "When any testator shall omit to provide in his or "her will for any of his or her children, or for the issue of any de- "ceased child, unless it shall appear that such omission was inten- "tional, such child, or the issue of such child, shall have the same "share in the estate of the testator as if he or she had died intes- "tate, to be assigned as provided in the preceding section."

(703). Sec. 19, Comp. Laws of 1876, p. 273, provides that if the decedent leave a husband or a wife and more than one child, the estate of the decedent goes one-fourth to the surviving husband or wife for life, and the remainder with the other three-fourths to the children.

Two issues are raised by the pleadings:

1st. Was the omission of the testator to provide in his will for his children intentional?

2nd. Had the testator in his life bestowed upon his children, by way of advancement, an equal portion of his estate?

But the second issue was abandoned by appellee on the hearing, (see transcript, p. 6), and the first issue was the only one tried.

The assignment of errors is found on page 11 of the transcript, and the questions of law raised thereby relate to the admission of parole testimony, tending to prove that the testator intentionally omitted to provide for his children: a part of such testimony being the contents of two drafts of former wills, not published or witnessed.

On the part of the appellants it is contended that the omission of the testator to provide in his will for his children, by virtue of the statute, annexes to the will the condition that the will shall be void, *quoad* the children, unless a contrary intention appears by intrinsic evidence, and that the operation of this rule of law is altogether independent of the intention of the testator except as that intention may be expressed in the will.

It is a general rule that the intent of a testator must be found on the face of the will, and that extrinsic evidence is inadmissible to show it, the exception being where such evidence is needed to remove a latent ambiguity.

1 Jarman on Wills, pp. 708-710 and note.
1 Redfield on Wills, 539.
2 Greenl. Ev., sec. 290.
Hawkins on Wills, p. 9.
Mann vs. Mann, 1 John., ch. 231.
Tucker vs. Seaman's Aid Soc., 7 Metc. (Mass.) 188.
Spencer vs. Higgins, 22 Conn., 526.
Kurtz vs. Hibner, 55 Ill., 514.

To this general rule and its limitation as stated we find no opposing authority, but it is contended in behalf of the Appellee that this rule is not applicable to the case at bar.

Our statute on the subject of pretermitted children is but an outgrowth of the common law doctrine of the implied revocation of a will by a subsequent marriage and birth of issue, and the authorities defining that doctrine of the common law will assist in arriving at the proper construction of the statute in question.

Under the doctrine above referred to, it was well settled that no revocation would be implied by law if the testator in his will made any provision, however small, for the future wife and children; such provision furnishing intrinsic evidence that he did not intend the future alteration in his circumstances to work a revocation of his will.

Knebel vs. Scrafton, 2 East., 541:

It was then contended, as it is claimed by Appellee in this case, that the entire doctrine was one of presumption raised by the parole proof of extrinsic circumstances, viz.: the subsequent mar-

riage and birth of issue, and that a presumption so raised could be rebutted by like parole evidence.

This contention received serious consideration in Marston vs. Roe, 8 Adolphus & Ellis, 303, decided in 1838; the case having been argued in the presence of all the Judges of England, with the exception of Lord Denman, as stated in the opinion; and it was in this case decided that no extrinsic evidence would be admissible to prove an intention against revocation, but that the revocation took place by virtue of a condition tacitly annexed to the will by the law, independent of the intention of the testator, except as such intention was expressed in the will. A portion of the evidence so excluded was, as in the case at bar, the drafts of two former wills.

And the reason for the exclusion of such evidence is stated to be, that the statute required wills of real estate to be in writing, and that the object of the statute was to prevent the title to real property from being dependent on "the perplexity and uncertainty of such conflicting evidence."

The same reason has existed in this Territory ever since 1852. See Sec. (654), p. 265, and Sec. (686), p. 271, Compiled Laws of Utah, 1876.

The case of Marston vs. Roe has been always followed in this country.

2 Greenl. Ev., Secs. 684, 685.
R. R. Co. vs. Wasserman, 22 Fed. R. 874.

In Massachusetts in 1783, a statute was passed containing the following provision, viz.: "That any child or children, * * "not having a legacy given them in the will of their father or "mother, shall have a proportion of the estate of their parent "assigned to him, her or them, as though such parent had died "intestate. * * *." St. of 1783, c. 24, Sec. 8. It was the well settled construction of this statute by the Supreme Court of said State, that although the child had no legacy left him in the will of the parent, yet if an intention to omit him appeared, he would not be entitled to any portion of the estate.

Tucker vs. Boston, 18 Pick., 167.
Wilson vs. Fosket, 6 Metc., (Mass.) 400.

But it was equally well settled that such intention could only be made to appear by intrinsic evidence, and that all extrinsic evidence of such intent was inadmissible. (See cases above cited.)

After this statute was thus judicially construed the laws of Massachusetts were revised. Sec. 21 of c. 62, Rev. St., provided that an heir for whom an ancestor omits to provide in his will, is entitled to a distributive share of the ancestor's estate, unless he shall have been provided for by the testator in his life time, or "unless it shall appear that such omission was intentional, *and not* "*occasioned by any mistake or accident.*" It is stated by the Commissioners for revising the statutes, in their note to the section last

quoted, that it is taken from St. 1783, c. 24, "adopting the con-
"struction which has been given to it by the Supreme Court."

See brief of counsel for appellee in Wilson vs. Fosket, cited ante.

Under this last statute Wilson vs. Fosket was decided in 1843. This case, without overruling the prior cases in Massachusetts under the statute of 1783, or intimating a doubt of their correctness, decided that the commissioners "had builded better than they knew," and that under the new statute parole evidence, including evidence of the parole declarations of the testator, was admissible to show that the testator intended to omit to provide for his child. This case has ever since been followed in Massachusetts under the same statute.

Iowa adopted the Massachusetts statute, last cited, and adopted with it the judicial construction placed thereon by the Massachusetts Courts.

Lorieux vs. Keller, 5 Iowa, 196.

We submit that unless the Massachusetts cases under the new statute find their warrant for the admission of extrinsic evidence in the words, "and not occasioned by any mistake or accident," they are opposed to both principle and the weight of authority.

It is difficult to conceive how a mistake or accident can be shown except by extrinsic evidence, and such mistake or accident as will permit the child to inherit, has been held in Massachusetts to be perfectly consistent with an intentional omission of the child's name from the will.

Ramsdill vs. Wentworth, 101 Mass., 126.

In Missouri the statute is substantially the same as the Massachusetts statute of 1783, and has uniformly received the same construction, viz.: that to disinherit a child it is not necessary that he should be named or provided for in the will of the parent, if the omission to do so appears to be intentional: but that such intention can only be proved by intrinsic evidence.

Bradley vs. Bradley, 24 Mo., 311.
Burch vs. Bram, 46 Mo., 441.
Pounds vs. Dale, 48 Mo., 270.
Wetherall vs. Harris, 51 Mo., 64.
See, also, Chace vs. Chace, 6 R. I., 407.

The Utah statute in question is precisely similar, it seems to us, to the Massachusetts statute of 1783 and to the Missouri statute as they were judicially construed.

In California in 1868, in the case of estate of Garraud, 35 Cal., 336, section seventeen of the Stat. of Wills of that State, of which (694) Sec. 10, Comp. Laws of Utah, 1876, is an exact copy, first received a judicial construction by the Supreme Court. In this case it was held that the intention of the testator to omit to provide for his children can only be gathered from the face of the will: that

it can only be proved by evidence competent to prove any other testamentary intention, and that evidence of the acts and declarations of the testator is inadmissible to prove such intention.

If the rule contended for by appellee is to become the law of this Territory, it will effectually put an end to all alienation of real estate held under wills similar to the one in this case. No lawyer could pass on the title, for the title would depend on the ability to persuade a jury by any parole evidence that a testator had conceived a certain intention. Was it the intention of the Legislature to leave the title to real estate in such an uncertain condition, and after expressly providing that all wills should be in writing and should not be revoked except in writing or by destruction of the instrument, to leave the door open to parole evidence of the intention of the testator to control and vary the legal effect of the will?

Suppose at the time of the actual execution of the will, the testator unintentionally omits to provide for his children, but that afterwards he changes his mind and declares his intention not to provide for them, is the will ambulatory in the meantime? and where are such changes to stop?

If there be any doubt as to the true construction of the statute in question, it would be settled by the consideration, that in adopting the California statute, we adopted its received construction in California which must be considered as accompanying the statute to this Territory, and forming an integral part of it.

Cathcart vs. Robinson, 5 Peters, 580.

Mr. Wells, in his work on *Res Adjudicata* and *Stare Decisis*, sec. 590, says: "It is the general rule that where a State adopts a "statute of another State, it adopts also the construction placed on "that statute by the courts of the State, because it is regarded as "a conclusive presumption that the legislature, in passing the act, "knew what construction had been placed upon it by the courts of "the State whence it was borrowed."

Bemis vs. Becker, 1 Kans., 248.

The leading case of estate of Garraud, 35 Cal., 336, was decided in 1868.

In the case of estate of Utz, 43 Cal., 200, decided in 1872, and in Pearson vs. Pearson, 46 Cal., 610, decided in 1873, the leading case was admitted by counsel to be controlling in California, and its authority has never been questioned in that State.

In 1876, the Legislature of Utah Territory enacted a statute of wills, seven sections of which were literally copied from the California act, as it was when the estate of Garraud was decided. (See sections 6-12 inclusive, compiled Laws of Utah, p. 271.) One of these sections, section 10, is the one invoked by appellants in this case. It is to be presumed, then, that the Legislature of Utah Territory was familiar with the judicial construction of the California statute placed thereon by the highest Court of that

State, and that they intended to adopt that construction when they adopted the statute.

On the trial of this case, evidence of the testator's declarations was rejected, except the two drafts of former wills before referred to; but what was claimed to be evidence of surrounding circumstances was admitted, it being contended that such evidence was competent to incorporate in a will an intention not found therein; and that its admissibility for the purpose stated presented a different question than the admissibility of the testator's declarations.

In view of this contention, it is a little singular that none of the cases dealing with statutes similar to ours, and with the question here presented, have proceeded upon this ground. All of the cases have discussed the question broadly as a question of the admissibility or incompetency of extrinsic evidence.

But we deny that for the purpose aimed at in this case there is any such distinction as that claimed by Appellee.

Although evidence of all the circumstances which surrounded the author of a written instrument will be received for the purpose of ascertaining his intentions, yet those intentions must ultimately be determined by the *language* of the instrument. No proof, however conclusive in its nature, can be admitted with the view of setting up an intention inconsistent with the known meaning of the writing itself. For the duty of the Court in all these cases is to ascertain, not what the parties may have really intended, as distinguished from what their words express, but simply what is the meaning of the words they have used. It is merely a duty of interpretation, and evidence of surrounding circumstances cannot change the legal effect of clear and unambiguous words.

2 Taylor.Ev., (8 Eng. Ed.), Secs. 1201 and 1202.
3 Jarman on Wills, 700 note (g).
2 Id., 115.
Reynolds vs. Fire Ins. Co., 47 N. Y., 606.
Partridge vs. Ins. Co., 15 Wall, 578.
Maryland vs. Railroad Co., 22 Wall, 105.
Kurtz vs. Hibner, 55 Ill., 514.
Waldron vs. Waldron, 45 Mich., 350.

There is no pretense made in this case that the language of the will is not clear and uuambiguons.

THE INTRINSIC EVIDENCE.

What is the known meaning of the will itself? What is the well settled legal effect of the clear and unambiguous words used therein? Does any intention to omit to provide for his children appear by reason of the testator's devise of all of his property to the Appellee?

The uniform language of the authorities are to the effect that no intention to omit to provide for the children appears by reason of the absolute devise to the Appellee.

R. R. Co. vs. Wasserman, 22 Fed. R., 874.
Pounds vs. Dale, 48 Mo., 270.
Ramsdill vs. Wentworth, 106 Mass., 320.
Bush vs. Lindsay, 44 Cal., 1 6.

The legal effect of a will so drawn, by virtue of the condition annexed to it by the statute, is, that so far as the rights of the children are concerned, the will is inoperative and void.

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Counsel for Appellants.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 398.

JOHN COULAM, GEORGE COULAM, HENRY COULAM, FANNY BAKER, SARAH J. HEINER AND ZERA SNOW, *Appellants*,

—*vs.*—

ANN DOULL, *Respondent.*

BRIEF FOR RESPONDENT.

BEN SHEEKS,
JOSEPH L. RAWLINS,
Attorneys for Respondent.

ACKERMAN & CO., PRINT., SALT LAKE CITY.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 898.

JOHN COULAM, GEORGE COULAM, HENRY COULAM, FANNY BAKER, SARAH J. HEINER AND ZERA SNOW, *Appellants*,

—*vs.*—

ANN DOULL, *Respondent.*

BRIEF FOR RESPONDENT.

The principal question to be determined in this case is: Was it error to admit extrinsic evidence to show that the omission to provide for the children was intentional?

The following are three sections of the statute relating to children not provided for in the will:

(693). "Sec. 9. When any child shall have been born after the making of its parents' will, and no provision shall have been made for him or her therein, such child shall have the same share in the estate of the testator, as if the testator had died intestate; and the share of such child shall be assigned as provided by law, in case of intestate estates, unless it shall be apparent from the will that it was the intention of the testator that no provision should be made for such child."

(694). "Sec. 10. When any testator shall omit to provide in his or her will for any of his or her children or for the issue of any deceased child, unless it shall appear that such omission was intentional, such child, or the issue of such child, shall have the same share in the estate of the testator as if he or she had died intestate, to be assigned as provided in the preceding section."

(696). "Sec. 12. If such child or children, or their descendants, so unprovided for, shall have had an equal proportion of the tes-

Abbott's Trial Ev., pp. 132, 136.
Taylor on Ev., Secs. 1227, 1229, 1231, and authorities there cited.
1 Williams on Ex., 237, note S.
Wilson vs. Fosket, 6 Met., 400.
Buckley vs. Gerard, 123 Mass., 8.
Peters vs. Siders, 126 Mass., 135.
Loring vs. Moore, 6 Wall., 350.
Lorieux vs. Keller, 5 Iowa, 196, 203.

Stephens says: "If the document is of such a nature that the Court will presume that it was executed with any other than its apparent intention, evidence may be given to show that it was in fact executed with its apparent intention."

In Reynolds vs. Robinson, 82 N. Y., at page 107, the Court uses the following language: "The law raises in certain cases presumptions against the apparent intention of the testator. * * * The Courts in these cases have permitted parol evidence to be given in support of the apparent intention of the testator, and to rebut the presumption which the law raises, 'for the effect of such testimony is not to show that the testator did not mean what he has said but on the contrary to prove what he has expressed.'"

The cases cited by counsel, on page 3 of their brief, upon this point are inapplicable, because the parol evidence was offered to change the plain meaning of the words used in the will, as that "money" meant "promissory notes" (1 Johnson, Ch. 231); or that while describing one tract of land, another was meant, (55 Ill. 514); or that by "The Seaman's Aid Society, in the City of Boston," the testator intended, "The Seaman's Friends Society," (7 Met., 188), both existing.

The Missouri cases are not authority under our statute.

The statute in that State was absolute. The Court in 24 Mo. 315, says: "Our Statute is not like the Massachusetts statute; for this has the provision in it, 'unless it shall appear that such omission was intentional, etc.'" (6 Met., 404.)

"We are not able to reason ourselves clear from the effect of our statutes by anything said upon the subject by the Massachusetts courts; ours is a positive enactment, no proviso to it on account of mistake or intentional omission."

Our statute and the statutes of Massachusetts, Iowa and California, are in substance, meaning and purpose precisely the same. Massachusetts was the original source from which it was derived and adopted.

Before its adoption in California or here, it had received a settled interpretation, both in Massachusetts and Iowa, which had also

been recognized and adopted before the enactment of the statute in this Territory by the Supreme Court of the United States.

6 Met., 400; 5 Iowa, 196; 6 Wall , 350.

The rule that the interpretation of a statute in its place of origin is adopted with it, can rationally be held to apply only to a long settled and well known interpretation, and even then the rule is not absolute. (See 5 Pet., 280). In this case the rule operates in our favor, because the Court would rather follow the prevailing interpretation than the casual departure from it, as evidenced by the case in 35 Cal. Besides, that case cannot be sustained as law. It starts with the erroneous assumption that the object of admitting extrinsic evidence is to alter the terms of the instrument, while in reality it simply confirms and gives them effect according to their apparent intention. The decision gives no effect to the implication which arises from the fact that the Legislature omitted to limit the proof of intentional omission to the will, while in other cases, where such was the intention, they so provided in express terms. It attempts to distinguish the California from the Massachusetts statute, which in effect are the same, and then admits that if the issue under the statute were one of mistake or inadvertence it would properly be resolved by parol evidence. Yet, in truth, this is the issue necessarily in every case arising under this statute. The sole object of the legislation, as its history shows, and all the authorities agree, is to afford relief to a child omitted from a will through inadvertence or mistake.

18 Cal., 291; 6 Met., 400.

The moment it is shown that the omission was not by mistake, it appears that it was intentional, and the will must stand. It is analogous to a case where a deed or other solemn instrument required to be in writing is attacked and sought to be cancelled for mistake. If, in such case, after the plaintiff had, by extrinsic evidence, made a *prima facie* case, the Court should rule that the defendant could not rebut it except by matter appearing upon the face of the instrument, the ruling would be no more absurd than this California decision. In that case, the evidence is admitted to show that the making of the instrument was the intentional act of the party, and not a mistake. So, in the case at bar, the evidence was admitted to show that the publication of the will as it is, giving the property to the wife to the exclusion of the children, was not the result of oversight or mistake, but the intentional act of the testator.

Abbott's Trial Ev., 136.

The earlier English authorities, and the authorities in this

country, admit parol evidence to rebut the presumption arising from subsequent marriage and the birth of a child.

Says Kent's Com., 523: "It is generally agreed that the implied revocation, by a subsequent marriage, and a child, being founded on the presumption of intention, may be rebutted by parol evidence."

Brady vs. Cubitt, Doug. 31.
Brush vs. Wilkins, 4 Johns. Ch., 506.

The mischief, which counsel seem to fear, cannot result from the admission of such evidence. The children take, if at all, not under the will, but by descent. The title to real property belonging to an estate, pending its settlement, is as to its ultimate destiny, always more or less uncertain. In this, as in all such cases, however, the title is conclusively settled by the decree of distribution.

Moreover, the title to real property, founded upon the most solemn instrument in writing, is liable to be upset in an appropriate proceeding by parol proof of mistake or fraud, if depending upon a will that may be set aside upon like evidence of fraud or undue influence. It has never been the object of the law to sacrifice justice for the sake of certainty.

In this case, if counsel are correct, then the testator went through all the formalities of making a will for no purpose. His will is rendered totally invalid. No right of dower existing, the wife would take a life interest in one-fourth only—nothing more than the statute itself, without a will, would have allowed her.

123 Mass., 8.
126 Mass., 135.
6 Wall., 350.

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